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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BRUCE SHELDON OSTERMAN, **Plaintiff and Appellant,** **v.** **STEVEN GOURLEY etc.,** **Defendant and Respondent.**	**A114587** **(Alameda County Super. Ct. No. RG05240945)**

Bruce Sheldon Osterman appeals a judgment denying his petition for a writ of administrative mandamus by which he sought to vacate a decision of Steven Gourley, as director of the California Department of Motor Vehicles (DMV), that suspended his driver's license for driving under the influence of alcohol. He contends the trial court abused its discretion in refusing to strike the DMV's answer and opposition to his petition and in denying him attorney fees. He also contends the evidence to support the suspension of his license was inadmissible.

BACKGROUND

"Driving Under the Influence Arrest--Investigation Report," California Highway Patrol (CHP) Form 202, Exhibit 1A

The five-page investigation report of CHP Officer Chris Konstantino contains the following information: On March 17, 2005, at approximately 10:34 p.m., Officer Konstantino observed appellant's car traveling eastbound at what appeared to be a speed in excess of 65 miles per hour on Interstate 80 just east of the San Francisco Bay Bridge

toll plaza. Officer Konstantino initially paced appellant's car at 76 to 78 miles per hour. As Officer Konstantino closed in on him, appellant eventually slowed to 55-60 miles per hour, moved to the far right lane, and continued onto the right shoulder, traveling approximately 300 feet with his right front and rear tires approximately two or three feet on the shoulder. He corrected his car onto the far right lane and slowed to 50 miles per hour.

Officer Konstantino stopped appellant for speeding and drifting onto the right shoulder. He smelled an odor of alcohol from appellant's breath. Appellant told Konstantino he had consumed one glass of wine at a corporate dinner earlier in the evening. When appellant failed three of the four field sobriety tests, Officer Konstantino arrested him for driving under the influence of an alcoholic beverage and transported him to the Oakland CHP station. The results of breath tests administered at 11:02 p.m. and 11:03 p.m. both showed a blood alcohol concentration (BAC) of .08 percent. During the breath test, appellant admitted to Konstantino's partner that he had consumed more than one glass of wine at the corporate dinner.

"Age 21 and Older Officer's Statement," DS 367 Form, Exhibit 1

On March 17, 2005, Officer Konstantino executed under penalty of perjury a two-page "Age 21 and Older Officer's Statement," commonly referred to as a DS 367 form. It also stated that appellant had a BAC of .08 percent on two tests administered in the "pm" of March 17, 2005. It stated that Officer Konstantino obtained these breath test samples in the regular course of his duties, that he was qualified to operate the equipment, and that the test was administered pursuant to the requirements of title 17 of the California Code of Regulations.[1]

Suspension

As is required by statute when a person is driving with a BAC of .08 percent or greater, Officer Konstantino issued appellant an "administrative per se" suspension order,

[1] Title 17 establishes the procedures for determining the "'concentration of ethyl alcohol in samples of blood, breath, urine, or tissue of persons involved in traffic accidents or traffic violations.' ([Cal. Code Regs., tit. 17] § 1215.1(b).)" (*Hernandez v. Gutierrez* (2003) 114 Cal.App.4th 168, 172.)

confiscated his license, and issued him a temporary driver's license. Appellant requested an administrative hearing to show the suspension was not justified. (Veh. Code, §§ 13353.2, 13558.)

Hearing

Critical to this appeal, three official records of the DMV were introduced into evidence: the above described exhibits 1, "Age 21 and Older Officer's Statement" DS 367 form, and 1A, "Investigation Report" CHP form 202, and exhibit 3, consisting of two pages.

The first page of exhibit 3, denominated at the hearing as the "breath test card," contains printed matter that is largely blurred and illegible and two handwritten notations: ".08 2314" and ".08 2315." At the bottom of the page are pre-printed designations for "SUBJECT'S NAME," "TIME FIRST OBSERVED," "INSTRUMENT LOCATION," and "OPERATOR." Handwritten above each of these printed designations are, respectively, "Bruce Sheldon Osterman," "2235," "CHP/OAK," and "C. Konstantino #10972."

The second page of exhibit 3 is entitled "Alameda County Sheriff's Office SUBJECT BREATH TEST REPORT." It contains eight subheadings.

The entry under the first subheading, "Sublast Subfirst," is "OSTERMAN BRUCE."

The entry under the second subheading, "Testdate Testtime," is "03/17/2005 23:00."

The entry under the third subheading, "Serial Location," is "66-002433 CHP OAKLAND."

The entry under the fourth subheading, "Operlast Operfirst," is "KONSTANTINO C."

The entry under the fifth subheading, "Agency," is "CHP/OAK."

The entry under the sixth subheading, "Test1," is ".08."

The entry under the seventh subheading, "Test2," is ".08."

The entry under the eighth subheading, "Test3," is "Not performed."

All subheading entries are generated by a printer; they are not handwritten.

Appellant's objections to exhibits 1, 1A, and 3 were overruled.

Appellant offered the testimony of David Lewis as an expert regarding the Intoxilyzer 5000, the kind of machine used to administer his breath tests, and the symptoms for being under the influence. Lewis was trained to trouble shoot the intoxilyzer during a three-day course at the intoxilyzer factory. He had no hands-on knowledge of the particular instrument used for appellant's breath test.

Lewis opined that exhibit 3 was not reliable because the two handwritten notations thereon, ".08 2314" and ".08 2315," did not follow the standardized procedure of Alameda County. County procedures have no description for allowing any handwritten entries, and exhibit 3 did not establish who made the handwritten notations or why.

Lewis explained that if the intoxilyzer is working properly, its print-out breath test card "will show the result of every sample that goes in the instrument airblank, calibration check, or what we call subject-test, and it will have the result and also the time." Lewis described page one of exhibit 3 as showing no "subject test result. There is a remnant of a blank airblank, and that shows a .01. . ." Lewis explained that the figure should be ".00," indicating the chamber of the intoxilyzer as well as the air in the room is clear of any alcohol. He considered the breath test card unreliable.

Lewis further explained that an officer normally takes the information on the intoxilyzer breath test card and enters it on the DS 367 form and the police report. Lewis was unable to determine the source of the second page of exhibit 3, the "Subject Breath Test Report," because it was not signed by the author or dated and contained no explanation as to why it was made.

Lewis explained that printing defects in intoxylizers are caused either by a dirty printer or electronic failure. An intoxilyzer is normally cleaned every two years. The maintenance records of the intoxylizer used for appellant's breath test showed more frequent attempts to clean it. Lewis concluded the printing problem was not caused by a dirty printer because cleaning the printer had not solved the problem, leaving electronic

calibration as the problem. The results of such a problem are nonprinting or incorrect numbers for time and BAC.

Lewis's evaluation of the February, March, and April 2005 calibration checks of the subject intoxylizer was that the instrument was reading "high," which would result in the printout producing an incorrectly high BAC.

Lewis noted that the DS 367 form contains spaces to check objective symptoms of intoxication, and that Officer Konstantino had checked "bloodshot watery eyes" and "odor of alcoholic beverage," but not "unsteady gait" or "slurred speech." Lewis's study of traits connected to levels of blood alcohol indicates that a person with a BAC of .08 percent or higher would have an unsteady gait and slurred speech. Lack of those traits is inconsistent with a BAC of .08 percent or higher, and odor of alcoholic beverage and bloodshot eyes are not traits that can be correlated with BAC levels.

Lewis acknowledged that, according to the three months of calibrations, the subject machine fulfilled title 17 requirements. He did not think the three-month calibration results validated the two handwritten notations on exhibit 3. He also acknowledged that, in addition to a printout breath test card, i.e., the first page of exhibit 3, the intoxylizer contains a liquid crystal display, similar to displays on many modern electronic instruments, on which the breath test results are shown. The test results are also in the software of the intoxylizer and can be printed on a document other than the breath test card. He thought that page two of exhibit 3, "Subject Breath Test Report," was generated from the memory of the intoxylizer, but because it did not contain a certificate of the custodian of records, he did not know the origin or derivation of the information printed on the report.

Hearing Officer's Decision

The hearing officer determined that appellant completed breath tests at 11:02 and 11:03 p.m, and each had a .08 percent BAC result. In response to appellant's claim that the intoxilyzer was "reading high," the hearing officer determined that appellant's contention "is based on a subjective interpretation of the evidence," and that expert Lewis

"admitted that the calibration checks were all within Title 17 requirements. [Expert Lewis] also stated that there are no violations to Title 17."

As to appellant's claim that the illegible chemical test results on page one of exhibit 3 were the result of electronic failure, the hearing officer determined Lewis had no hands-on knowledge of this particular Intoxilyzer 5000. She noted that Lewis was trained to repair the Intoxilyzer 5000 sometime between 1984 and 1990, but admitted the machine may have been updated since his training. He also admitted he did not know whether he had greater knowledge of this particular machine than the person who completed the maintenance record. Lewis also admitted that his opinion that this particular machine suffered electronic failure was without any hands-on knowledge of the particular machine.

The hearing officer also found that Lewis's testimony was overly speculative, in that he conceded his opinion regarding electronic failure was based on a "concern," not on any hands-on knowledge. Lewis also admitted that the breath test results would be visible to the operator by display at the time of the test. He also acknowledged that the machine stores the breath test results in memory, "thus making possible the Subject Breath Test Report" shown on page two of exhibit 3.

The hearing officer concluded that, by a preponderance of evidence, appellant was driving a motor vehicle at a time his BAC was at or above .08 percent. As a result of her decision, appellant's driving privileges were suspended.

Petition for Writ of Administrative Mandamus

Appellant petitioned for a writ of administrative mandamus (Code Civ. Proc., § 1094.5, Veh. Code, § 13559) directing the DMV to set aside its decision to suspend his driver's license. The gravamen of his petition was invalid breath test results. The DMV opposed the petition on the grounds the hearings officer's findings were supported by the weight of the evidence, including credibility determinations which the hearing officer alone may make.

The court's statement of decision concluded that the preponderance of the evidence supported the finding that appellant had a .08 percent BAC while driving an

automobile. It concluded that all DMV exhibits were admissible, and the testimony of expert Lewis was not sufficient to overcome the presumption that the test results were valid. "[His] testimony was speculative in nature, in part because it was not based on actual testing of the Intoxilyzer 5000 machine used to measure" appellant's BAC. The court then issued a judgment denying the petition.

Appellant moved for new trial and to set aside and vacate the judgment on the grounds there was insufficient evidence to support the court's decision, the court erred in admitting exhibit 3, and it abused its discretion in considering the DMV's untimely-filed answer to his petition. In its order denying his motion the court stated, inter alia: "Assuming that the [two] handwritten [notations] on [exhibit 3, page 1] are not admissible, the test results are admissible to show that Officer Konstantino gave a breath test to [appellant]. The DS-367 [form, exhibit 1], supplemented by the Investigation Report [CHP form 202, exhibit 1A], establish that the results of the tests were .08% BAC. [¶] The DS-367 [form] is properly supplemented by [exhibits 1A and 3, page 2], which show that the breath tests were administered within three hours after driving. [¶] . . . [T]he Court hereby finds that the preponderance of the evidence shows that the Alameda County Sheriff's Office complied with the Title 17 requirements."

DISCUSSION

Standard of Review

When a person's driving privileges have been suspended by the DMV due to driving with a BAC of .08 percent or more, the person may file a petition for review of the DMV's order in the trial court. "The review shall be on the record of the hearing and the court shall not consider other evidence. If the court finds that the [DMV] exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is not supported by the evidence in the record, the court may order the [DMV] to rescind the order of suspension . . . and return, or reissue a new license to, the person." (Veh. Code, § 13559.) The standard of the superior court's review as articulated in Vehicle Code section 13559 concerning whether the DMV's decision is supported by the evidence in the record is

consistent with the standard in Code of Civil Procedure section 1094.5, subdivision (b), which states that an abuse of discretion is established if ". . . the findings are not supported by the evidence."

"'A driver's license is a fundamental right for the purpose of selecting the standard of judicial review of an administrative decision to suspend or revoke such license. . . . [S]uspension . . . should be ordered only after the administrative record receives that "independent judgment review." [Citation.]'" (*Coombs v. Pierce* (1991) 1 Cal.App.4th 568, 576.)

In the exercise of its independent judgment of the facts, the trial court, while weighing the evidence, "'can and should be assisted by the findings of the [agency]. The findings of the [agency] come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the [agency's] decision is contrary to the weight of the evidence.' [Citation.]" (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 139; accord, *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

In an appeal from a judgment where the trial court exercises its independent judgment, the appellate court applies the substantial evidence test to the trial court's determination. (*Fukuda v. City of Angels, supra*, 20 Cal.4th at p. 824.) It is obligated to sustain the trial court's findings if substantial evidence supports them. (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314.) "In reviewing the evidence, an appellate court must resolve all conflicts in favor of the party prevailing in the superior court and must give that party the benefit of every reasonable inference in support of the judgment. When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court. [Citation.]" (*Ibid.; Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 321.)

I. *Untimely Answer and Opposition*

Appellant's first claim of error is that the trial court abused its discretion in refusing to strike the DMV's untimely answer and opposition to his petition. As he

argues, absent an answer from the DMV, all material allegations in his petition for writ of administrative mandamus are deemed admitted, and the fundamental allegation of his petition was that the hearing officer lacked sufficient competent evidence to find he was driving with a BAC of .08 percent.

a. Procedural Background

Code of Civil Procedure section 1089.5 states: "Where a petition for writ of mandate is filed in the trial court pursuant to Section 1088.5[2], and where a record of the proceedings to be reviewed has been filed with the petition . . . , the respondent shall answer or otherwise respond within 30 days after service of the petition. However, where a record of the proceeding to be reviewed has been requested . . . and has not been filed with the petition, the party upon whom the petition has been served, . . . shall answer or otherwise respond within 30 days following receipt of a copy of the record."

Appellant filed his petition without an administrative record on November 7, 2005.

On November 10, 2005, the DMV acknowledged that it had been served with appellant's petition.

On December 16, 2005, Toni E. McCartey, DMV senior motor vehicle technician, litigation services, executed an affidavit that states: (1) The records of the DMV on appellant are "under my control and I have authority to certify records." (2) "The attached are true and correct copies of the records in this case."[3] (3) "These records were received by or prepared by personnel of the [DMV] in the ordinary course of business at or near the time of the act, condition or event." (4) "The original documents, from which copies were made, are retained in the files of this department." Appellant asserts that this affidavit demonstrates that the DMV received the administrative record "internally" on December 16, 2005.

[2] Code of Civil Procedure section 1088.5 states: "In a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for a writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court."

[3] McCartey's reference to "the attached" is unclear, as there are no attachments to her affidavit in the appellate record.

On December 25, 2005, appellant served the administrative record on the DMV. The record contains a certification from the DMV that the 87 pages of attached photocopies are true and correct copies of the original documents on file with the DMV.

On January 24, 2006, appellant served and filed a notice of motion and motion for an order and judgment granting a peremptory writ of administrative mandamus directing the DMV to set aside its suspension of his driver's license. Hearing on his motion was scheduled for February 17, 2006.

On February 6, 2006, the DMV filed and served its answer to the petition and memorandum of points and authorities in opposition to the motion.

On February 10, 2006, appellant filed his reply to the DMV's answer and opposition. He asserted the DMV's answer was untimely because the DMV had 30 days from the day it "received the [administrative] record" on December 16, 2005, to file its answer, i.e., until January 17, 2006 (the 30th and 31st days were a Sunday and the Martin Luther King, Jr., holiday). Nevertheless, it did not file its answer until February 6, 2006. Therefore, appellant argued, the DMV's answer should be disregarded, and the material allegations in his petition deemed admitted by the DMV.

Prior to the scheduled February 17, 2006 hearing the court issued a tentative ruling in appellant's favor.[4] The question of the DMV's allegedly untimely answer was not discussed at the February 17 hearing.

On March 21, 2006, the court issued a four-page order and statement of decision, changing its tentative ruling. The court denied the petition for administrative mandamus. In a single and penultimate sentence of the statement of decision, the court stated: "The Court, in its discretion, and in the interests of justice, considered the DMV's answer in ruling on this petition." The court denied appellant's request for attorney fees under Government Code section 800 as moot.

Judgment was entered April 19, 2006. Thereafter, appellant moved to set aside the judgment and for new trial on the grounds of, inter alia, the court's abuse of discretion in

[4] The tentative ruling is not in the appellate record, but its conclusion is evident from the remarks of the DMV lawyer at the February 17, 2006 hearing.

considering the DMV's answer *sua sponte*. He argued the court had no discretion to consider the answer because the DMV never asked for relief from default or provided a justifiable reason for the untimely filing.

In reply, the DMV first argued that the administrative record was created on December 16, 2005, but "created" is not synonymous with being "served" for purposes of a petition for administrative mandate. Furthermore, the DMV asserted, even assuming its answer was filed late, there was no requirement that it had to move for relief from default because appellant had not moved for default nor was a default entered against the DMV. Moreover, a writ cannot be issued by default. (Code Civ. Proc., § 1088.) Therefore, according to the DMV, the court never lost jurisdiction to consider the DMV's late answer, nor was the DMV obligated to provide justification to the court prior to filing its late answer.

In its order denying appellant's motion to vacate, the court stated that, "in its discretion, and in furtherance of the policy of deciding cases on the merits, [it] has exercised its discretion to consider [appellant's] answer. Neither [Code of Civil Procedure section 1089.5] nor the language in *Block v. Superior Court* (1998) 62 Cal.App.4th 363, 368, fn. 2, [which states that failure to answer a petition is considered an admission of the truth of the allegations] addresses the issue of the Court's discretion to consider a late-filed answer in the absence of any showing of prejudice."

b. Analysis

On appeal appellant argues that the court abused its discretion in considering the DMV's answer *sua sponte* because the DMV was first obligated to move under Code of Civil Procedure section 473 or otherwise seek permission for leave to file a late answer on a showing of good cause. Without specifying the triggering event that started the running of the 30-day period of Code of Civil Procedure section 1089.5, the DMV concedes on appeal that its answer to appellant's petition was filed "several days after the 30-day due date."[5] However, it argues that it was not required to make a formal request

[5] As noted, *ante*, Code of Civil Procedure section 1089.5 speaks of answering a petition for writ of mandate "within 30 days following receipt of a copy of the record." Appellant

to file a late answer before the court could exercise its discretion to consider its late answer.

Code of Civil Procedure section 473, subdivision (a)(1) provides that "[t]he court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading . . . and may upon like terms allow an answer to be made after the time limited by this code." Assuming, without deciding, that section 473 requires a defendant to notice a motion for leave to answer beyond any of the statutory time limits in the Code of Civil Procedure, including section 1089.5, the court here could reasonably conclude that appellant was not prejudiced by the DMV's failure to do so.

Appellant was served with the answer the same day it was filed, 11 days before the scheduled hearing on his petition. He had notice of both the fact and content of the answer in adequate time to prepare for the hearing. (Cf. *Stockton v. Newman* (1957) 148 Cal.App.2d 558, 563.) Moreover, a petition to the trial court for a writ of administrative mandamus is in the nature of an appeal. Relevant evidence and the parties' theories as to their rights to recovery or defenses have been presented at the administrative hearing. By the time of the petition proceedings, the parties are familiar with the facts and issues and their opponents' arguments. Unlike an answer to an original complaint, the answer to the

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asserts that litigation services technician Toni McCartey "acknowledged that she 'received' the Administrative Record on December 16, 2005," citing McCartey's affidavit. The affidavit itself does not support his assertion. It simply states that "[t]he attached are true and correct copies of the records in this case" and "[t]hese records were received by or prepared by" DMV personnel. Whatever "copies" may have once been "attached" to the affidavit are not so attached in the appellate record. Furthermore, the affidavit does not specify whether "these records" were "received" *or* "prepared."

A more plausible interpretation of McCartey's affidavit is that it accompanied copies of records that the DMV had been requested to gather and send elsewhere for the purpose of being compiled into an administrative record. A more reasonable date of the DMV's "receipt" of the administrative record for purposes of section 1089.5 is the date appellant served it, i.e., December 25, 2005, insofar as the DMV does not identify the date thereafter that the administrative record actually arrived at its office. The 30-days-later due date would therefore be January 24, 2006, which was a non-holiday Tuesday. The DMV filed its answer 13 days later, February 6, 2006.

petition is not the petitioner's initial introduction to the respondent's contentions. The DMV's answer to appellant's petition contained no new matters of substance that would have jeopardized appellant's ability to be prepared to respond thereto by time of the scheduled hearing. (Cf. *Central Surety & Ins. Corp. v. Foley* (1962) 204 Cal.App.2d 738, 744.)

We find no abuse of discretion. Code of Civil Procedure section 475 provides that "[t]he court must, in every stage of an action, disregard any error . . . or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties." Not only is there a strong policy favoring disposition of cases on their merits (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854-855), writs by statute cannot be granted by default. (Code Civ. Proc., § 1088.) Not to have considered the DMV's answer because it was filed late would be tantamount to granting the writ by default. Under the circumstances of this case, justice would not have been served by the court's taking the extreme position of striking the DMV's answer because the DMV had not complied strictly with the filing due date.

II. *Inadmissible Evidence*

a. DMV Exhibits 1, 1A, and 3

Appellant contends there was insufficient evidence that he was driving with a .08 percent BAC because the finding was based on inadmissible evidence. He argues that, singly and collectively, the three pieces of documentary evidence presented by the DMV--the DS-367 form (Officer's Statement, exhibit 1), the driving under the influence arrest/investigation report (CHP form 202; exhibit 1A), and the intoxilyzer breath test card/breath test subject report (exhibit 3)--did not satisfy the requirements for admission as public employee records (Evid. Code, § 1280; Veh. Code, § 23612, subd. (g)(2)(A).) He further argues there was unrefuted evidence that the intoxilyzer was not working properly.

The rules governing the evidence available at "administrative per se" hearings are set forth principally in Vehicle Code section 14104.7, which provides that the DMV shall consider its official records and may receive sworn testimony, and Vehicle Code section

14112, which incorporates the provisions of the Administrative Procedures Act governing administrative hearings generally for all matters not specifically covered in the Vehicle Code. (*MacDonald v. Gutierrez* (2004) 32 Cal.4th 150, 156 (*MacDonald*).) The Administrative Procedures Act provides that an administrative hearing, with certain exceptions not applicable here, need not be conducted according to the technical rules relating to evidence and witnesses. All relevant evidence is admissible if it is the sort of evidence "on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." (Gov. Code, § 11513, subd. (c).)

MacDonald, supra, 32 Cal.4th at pages 158-159 concluded that under this statutory scheme the DMV may consider the arresting officer's sworn and unsworn reports. "'A police officer's report, even if unsworn, constitutes "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.'" [Citation.] Again, too, we must not lose sight of the reason for the 'slight relaxation of the rules of evidence applicable to an administrative per se review hearing[.]'. . . . [¶] [S]o long as a sworn report is filed, it is consistent with the relaxed evidentiary standards of an administrative per se hearing that technical omissions of proof can be corrected by an unsworn report filed by the arresting officer."

Here, Officer Konstantino's sworn report (DS-367 form, exhibit 1) states that appellant was arrested at 10:45 p.m., March 17, 2005, and the results of two breath tests administered in the "pm" of March 17, 2005 were both .08 percent BAC. It states that Konstantino obtained the breath test sample results in the regular course of his duties, that he was qualified to operate the equipment, and that the test was administered pursuant to the requirements of title 17. This "pm" entry on the DS-367 form is fleshed out by the notations in the "chemical test information" section of Officer Konstantino's accompanying unsworn investigation report (CHP form 202, exhibit 1A) that the tests were given at 23:02 and 23:03.

Officer Konstantino's sworn report is further amplified by exhibit 3, the two-page intoxilyzer breath test card/breath test subject report. When a peace officer arrests a person on suspicion of driving with a BAC of .08 percent or more, the officer is required to forward to the DMV a sworn report of all information relevant to the enforcement action immediately, including, inter alia, a report of the results of any chemical tests conducted on the person. (Veh. Code, § 23158.2, subd. (a); *Lake v. Reid* (1997) 16 Cal.4th 448, 457.) The section of the sworn DS-367 form in which Officer Konstantino entered appellant's breath test results instructs the person making the entries to "[a]ttach copy of the results, if available." Under the presumption that an official duty has been regularly performed (Evid. Code, § 664), we presume that Officer Konstantino forwarded his sworn DS-367 form to the DMV and included with it exhibit 3 as the report of the chemical test performed on appellant. Although the printout numbers on page one of exhibit 3, the "breath test card," are illegible, the handwritten notations on page one plainly identify Officer Konstantino as the operator of the intoxilyzer and "CHP/OAK" as its locale, and the printed information on page two, captioned "Subject Breath Test Report," identifies the serial number of the intoxilyzer used for appellant's breath test, as well as the "23:00" test time, the two ".08" test results, and "Konstantino C" and "CHP/OAK" as the operator and testing agency.

In the administrative hearing setting, exhibits 1A and 3 were admissible as "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code, § 11513; see also *MacDonald*, *supra*, 32 Cal.4th at p. 159.) In conjunction with Officer Konstantino's sworn statement (DS-367 form, exhibit 1), they constitute substantial evidence to support the trial court's finding that appellant was driving with a .08 percent BAC when he was arrested by Officer Konstantino. (*Fukuda, v. City of Angels, supra*, 20 Cal.4th at p. 824; see also, *MacDonald*, *supra*, 32 Cal.4th at pp. 153, 154: CHP form 202 report that driver's BAC was twice tested at .11 percent, together with form 367 sworn report that driver stopped while weaving, were sufficient evidence to suspend license.)

Appellant argues that the DS-367 and CHP 202 forms were inadmissible because they were solely dependent on the defective intoxilyzer printout. While the figures on the "breath test card" (page one of exhibit 3) are illegible, the intoxilyzer, according to appellant's expert Lewis, also has a liquid crystal display that makes the results visible to the operator. Lewis also testified that the intoxylizer test results can be printed on a document other than the breath test card, and he thought that page two of exhibit 3, the "Subject Breath Test Report," was generated from the memory of the intoxylizer. Because the trial court could presume that Officer Konstantino, as operator, regularly performed his duty of conducting the test, including observing the display on the intoxylizer, obtaining a printed report additional to the breath test printout, and accurately recording his observations (see Evid. Code, § 664; *Poland v. Department of Motor Vehicles* (1995) 34 Cal.App.4th 1128, 1137), it could infer the test results he entered on his sworn statement and investigation report were an accurate account of the test results he had observed on the intoxylizer display and read from the report. Absent evidence to rebut the presumption, it could also infer that the test results in Officer Konstantino's reports had to have come from his observation of the intoxilyzer display and printed report, insofar as the breath test printout card was indisputably illegible.

b. Malfunctioning Intoxylizer

Appellant argues there was unrefuted evidence from expert Lewis that the intoxylizer was not operating properly; therefore, the trial court erred in finding his testimony was speculative. Specifically, the trial court found that Lewis's testimony was insufficient to overcome the presumption that the test results were valid because his testimony was speculative, in part because it was not based on an actual test of the intoxilyzer that was used to test appellant's breath.

"[T]he presumption of official duty regularly performed (Evid. Code, § 664) supplies sufficient indicia of the trustworthiness of blood-alcohol test results to justify reliance upon such results to support a license suspension, subject to a showing by the licensee that the test was not performed in compliance with statutory requirements. [Citation.]" (*Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 141.)

By statute and attendant regulations, law enforcement agencies have an official duty to perform blood-alcohol analyses by methods devised to assure reliability. (*Ibid*.) These regulations are contained in title 17, sections 1215-1222.2. (*Id*. at p. 142.) They include requirements that methods of analysis be in accord with specified standards of performance and procedure, including the requirement that instruments used for alcohol analysis be in good working order and are checked routinely for accuracy and precision. (*Imachi v. Department of Motor Vehicles* (1992) 2 Cal.App.4th 809, 816; Cal. Code Regs., tit. 17, § 1220.2, subd. (a)(5).) The regulations establish a standard for the competency of the results of blood-alcohol tests. (*Davenport, supra*, 6 Cal.App.4th at p. 142.) Compliance with the regulations establishes a foundation for admission of test results into evidence at any proceeding and a basis for finding the results legally sufficient evidence to support the requisite finding in the proceeding. (*Ibid*.) Thus, the burden of proof as to the nonexistence of the foundational reliability of tests on which an officer's report is based lies with the licensee, who must show that the test was not properly performed. (*Id*. at p. 143; *Imachi, supra*, 2 Cal.App.4th at p. 817.) The showing cannot rest on speculation; it must demonstrate a reasonable basis for an inference that the procedures were not properly followed. (*Petricka v. Department of Motor Vehicles* (2001) 89 Cal.App.4th 1341, 1348.)

While Lewis testified that the intoxilyzer was "reading high" and opined that appellant's illegible printout breath test card was caused by an electronic failure of the intoxilyzer, he also testified that the four calibration tests performed on the intoxilyzer in the month preceding appellant's test were within the title 17 requirements. Furthermore, as the hearing officer observed, Lewis had no knowledge of this specific intoxylizer, and he acknowledged that, according to the maintenance logs, there were no title 17 violations. Therefore, the trial court could reasonably conclude that the intoxylizer met the regulatory standards for instrument performance, and that Lewis's testimony about the intoxylizer reading "high" and electronic failure did not suffice to meet appellant's burden of showing his breath tests were improperly performed due to a malfunctioning intoxilyzer.

In a related argument, appellant asserts the court erred in failing to address Lewis's uncontradicted testimony that the illegible printing on the printout breath test card was caused by electronic interference or printing error, thereby rendering the test results inaccurate and unreliable.

The court found that the preponderance of the evidence supported "the conclusion that the DMV complied with title 17. The evidence shows that the results of calibration tests on the intoxilyzer machine were all within title 17 guidelines. The testimony of [Lewis] was not sufficient to overcome the presumption that the test results are valid. That testimony was speculative in nature, in part because it was not based on actual testing of the [intoxylizer] used to measure" appellant's BAC. While this finding did not refer specifically to Lewis's testimony regarding electronic interference or printing error, the breadth of the finding encompassed his testimony and its probative effect. Moreover, the hearing officer found, which finding the trial court strongly presumes to be correct (*Bixby v. Pierno*, *supra*, 4 Cal.3d at p. 139), that Lewis conceded that his "opinion regarding the electronic failure" of the intoxylizer was based on a "concern," not on any hands-on knowledge of the specific machine, and conceded that the person who made the entries in the intoxilyzer's maintenance record did have knowledge of it.

c. Inconsistent Times

Appellant argues that the inconsistencies on the DMV documents as to the time of the breath tests make the test results unreliable and inadmissible because "it is pure speculation which document is correct." The handwritten notations on the breath test card (exhibit 3, page one) for the times of the test are "2314" and "2315." The test time entries in the "Chemical Test Information" box of the CHP form 202 investigation report are "2302" and "2303." The test time entries on the DS-367 report are "3-17-05 PM." The trial court found that the statements in the DS-367 form were consistent with the breath test results, and that the "Chemical Test Information portion of the document shows that the breath tests were given at 11:02 p.m. and 11:03 p.m. This document is admissible and there is a presumption that it is accurate."

The apparently inconsistent test times do not undermine the reliability of the test results. Officer Konstantino first observed appellant at approximately 10:34 p.m., when he saw appellant exceeding the speed limit, and arrested him at 10:45 p.m. Whether the breath tests were given 17 and 18 minutes after his arrest, i.e., 11:02 and 11:03 p.m., or 29 and 30 minutes after his arrest, i.e., 11:14 and 11:15 p.m., the test results were the same: a BAC of .08 percent. A test at either time is sufficient evidence that appellant had a BAC of at least .08 percent when he was driving.

d. Validity of Second Breath Test

Appellant argues the second breath test violated title 17 because section 1221.4(a)(1) requires that each test be preceded by a .00 percent BAC airblank, and the figure after "second airblank" on the printout breath test card is ".01."

Title 17, section 1221.4(a) sets out the procedures for breath alcohol analyses. Section 1221.4(a)(1) states: "For each person tested, the breath alcohol analysis shall include analysis of 2 separate breath samples which result in determination of blood alcohol concentrations which do not differ from each other by more than 0.02 grams per milliliter." Because the two breath tests were identical--.08 percent--they did not differ by 0.02 grams per milliliter.

e. Attorney Fees

Appellant contends the trial court abused its discretion in denying him attorney fees under Government Code section 800. We find no abuse because the court's statement of decision and judgment were not in appellant's favor.

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Gemello, J.

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Needham, J.